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IN THE

Supreme Court of the United States

October Term, 1957

No. 305

In the Matter
of
SLEEP PRODUCTS, INC.,
Bankrupt.

LOCAL 140 SECURITY FUND,
Petitioner,

WILLIAM S. HACK, Trustee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion in the Court of Appeals is not yet officially reported. It is annexed hereto as Appendix A. The opinion in the District Court is reported at 141 F. Supp. 463 and appears in the Appendix below, copies of which are being submitted herewith, at pages 59a to 73a, inclusive. The opinion of the Referee in Bankruptcy is set forth in said Appendix at pages 49a to 55a, inclusive.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on March 4, 1957. An extension of time to August 2, 1957 for the filing of this writ was granted by a Justice of this Court on May 24, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Are employer contributions to an employee welfare plan, made pursuant to a collective bargaining agreement, entitled to a priority as "wages" pursuant to § 64a(2) of the Bankruptcy Law [11 U. S. C. 104(a)(2)]?

2. Are such employer contributions "due to workmen" within the meaning of § 64a(2) of the Bankruptcy Law?

Statute Involved

§ 64a(2) of the Bankruptcy Act reads as follows:

> "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; * * *; (2) wages not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; (3) * * *."

Statement of the Case

This petition seeks review by this Court of an order of the Court of Appeals for the Second Circuit, affirming an order of the District Court for the Southern District of New York dated April 6, 1956 (App. 74a), confirming an order of a Referee in Bankruptcy (App. 57a) disallowing a claim filed by Local 140 Security Fund, petitioner herein, in a bankruptcy proceeding.

The jurisdiction of the Court of first instance was invoked pursuant to 28 U. S. C. §§ 1331 and 1334.

There is no dispute regarding the facts, which were stipulated before the Referee and the District Court.

On August 15, 1952, the Bankrupt entered into a collective bargaining agreement with Bedding, Curtain & Drapery Workers Union, Local 140 of the United Furniture Workers of America, CIO (hereinafter referred to as Local 140) (App. 12a). The agreement, a copy of which is annexed to the stipulation as Exhibit "C", contains the usual terms regulating the hours, wages and working conditions of the employees covered by it. It sets forth customary provisions with respect to holidays, vacations, arbitration of grievances and similar matters (App. 32a ff.).

Paragraph Thirty-second of the Agreement (App. 45a) provides that the Bankrupt was to pay to the petitioner a sum equal to 6½% of the monthly gross payroll "for the purpose of financing a Security Plan for the benefit of the employees of the Employer within the bargaining unit. * * * It is understood that the social benefits to be provided will meet the requirements of all applicable laws and will satisfy the Employer's obligations under the New York State Disability Law, without further obligation on the part of the Employer."

The record discloses that from time to time since 1950, Local 140 has entered into similar collective bargain-

ing agreements with a number of employers in the bedding industry (App. 11a).

The nature of the petitioner is described in the Stipulation of Facts. Petitioner was organized on August 1, 1950 by virtue of an Agreement and Declaration of Trust, a copy of which is annexed to the Stipulation as Exhibit "A" (App. 15a), for the purpose of financing various types of social insurance including life insurance, accident and health insurance, insurance for medical care and hospitalization, and disability benefit insurance (App. 11a).

Subsequently, and on March 13, 1952, a second Trust Fund, the Local 140 Pension Fund, was created for the purpose of financing payment of retirement pensions. Since that date petitioner has been paying over to the Pension Fund a portion of the sums received by it (App. 12a).

Although the agreement provides for monthly payments by the Bankrupt to the petitioner, in fact the Bankrupt was delinquent in payment. For the three month period immediately preceding the filing of the petition in bankruptcy, the gross payroll amounted to $15,288.53. Of this sum, 6½% or $993.75 was required to have been paid by the Bankrupt to the petitioner for the purposes aforesaid. This money was in fact not paid. Petitioner filed a timely claim with the Referee claiming a priority on the ground that the payments constituted wages due to workmen within the meaning of the Bankruptcy Act (App. 13a, 14a).

By virtue of the contract between Local 140 and other employers, including the Bankrupt as aforesaid, insurance benefits have been provided for members of Local 140 for life insurance, accident and health insurance, medical care insurance, hospitalization, disability benefits and, since 1952, pensions. The employees of the Bankrupt have enjoyed the insurance and pension benefits above referred to until the filing of the voluntary petition herein (App. 13a).

Neither the Bankrupt nor any of the individual employees has any right, title or interest in the trust-fund, except the right to insurance coverage and welfare benefits. No employee has an option to receive any part of the employer's contribution in lieu of insurance benefits. The employer's contribution to petitioner is not subject to the payment of income and/or withholding taxes by the employees (App. 13a).

On these facts, the Referee disallowed the claim of priority (App. 57a), and the District Court (App. 74a) and the Court of Appeals (Appendix A hereto) affirmed. This petition followed.

Reasons for Allowing the Writ

I.

This case presents an important question affecting the administration of the Bankruptcy Act, which grows more pressing every year. Insurance and pension funds paid for by employers have become a most important part of current collective bargaining. As of about three years ago, more than eleven million workers (excluding government and railroad employees) were covered by welfare and/or pension plans by virtue of union contract. This is more than twenty times greater than the number so covered a decade ago. See Rowe "Health Insurance and Pension Plans in Union Contracts", Monthly Labor Review, September, 1955, p. 993.

Most union contracts providing for the establishment of insurance and pension plans call for such plans to be supported exclusively by employer contributions. In 1954, 62.1% of the workers participating in insurance plans were covered by plans so financed. In the pension field, this proportion was even greater. 84.7% of all employees covered by pension plans enjoy such coverage exclusively

at the expense of their employers. See Rowe, *supra*, p. 993.

As will appear below, prior to 1955 several Referees in Bankruptcy had considered the question as to whether failure of the employer to make such contributions pursuant to agreement constituted a "wage claim," entitled to priority under the Bankruptcy Act. So far as we know, all of them held that such claims were entitled to priority.

With the increased number of workers covered by such plans and the increase in the number of bankruptcies in the past few years,[1] a substantial number of cases presenting this issue have been brought in the Bankruptcy Courts in the recent past. Aside from the instant case, two District Court decisions since 1955 have reached opposite results. The number of inquiries received by counsel for the petitioner, following upon the decision of the Court of Appeals in this case, indicates that there must be a score or more of such matters pending before Referees at the present time, some of which are being held up pending the disposition of this petition.

II.

Opinions by Referees in Bankruptcy are not customarily reported. The first decision on the subject we have been able to find was that of Referee Joyce in *Matter of 534 Catering Corp.*, No. 84856, Southern District of New York, September 21, 1949. His opinion reads in full as follows:

> "The question presented is whether the required contributions accruing within three months before the date of Bankruptcy, November 26, 1946, are wages within the meaning of Section 64a(2) of the Bankruptcy Act (11 U. S. C. 104). The term means

[1] In the fiscal year 1949-50, 33,392 bankruptcy cases were commenced in the federal courts. By the year 1955-56, this had increased to 62,086. Annual Report of the Director of the Administrative Office of the United States Courts, 1950 (p. 188) and 1956 (p. 270).

compensation or reward for services rendered; In re New England Thread Co., 158 Fed. 788, 792; In re Thomas Deutschle & Co., 182 Fed. 430, 431. It includes vacations; In re Wil-low Cafeterias, Inc., 111 F. (2d) 429; and severance pay; In re Public Ledger, 161 F. (2d) 762.

"The trustee urges that the present case differs because no part of the contribution is payable to or demandable by the employee, although he is entitled to receive the benefits which the funds are designed to provide. The fact remains, nevertheless, that the services of the employee constitute the entire consideration for the employer's payments to the fund. The form or character of the consideration given or promised by the employer is unimportant so long as it represents compensation for the services of the employee. Priority is allowed to the first named claimant in the sum of $146.40 and to the other in the amount of $68.25."

We know of six other cases deciding the same issue between 1949 and 1955: *Matter of Berkey & Gay Furniture Co.* (D. C. W. D. Mich., Bankruptcy No. 10008); *Matter of Ehrlich & Meyers* (D. C. E. D. Pa., Bankruptcy No. 23003); *Matter of Westbury Stylists, Inc.* (D. C. E. D. Pa., Bankruptcy No. 23058); *In re Schmidt* (D. C. S. D. Calif., Bankruptcy No. 55,561-T); *In re Scheibler* (D. C. S. D. Calif., Bankruptcy No. 55,560-T), and *Matter of Fidelity Tube Corp.* (D. C. N. J., Bankruptcy No. 504-53). None of these cases has been officially reported; the *Schmidt* and *Scheibler* cases are unofficially reported at 33 LRRM 2283.

In every one of these cases, the referee decided that such employer contributions were entitled to priority.

The first holding to the contrary was in *Matter of Brassel*, 135 F. Supp. 827 (D. C. N. D. N. Y., 1955). This decision was followed by the District Court decision in the instant case. Pending the appeal to the Court of Appeals herein, the District Court for the Southern District of California, in *In re Otto*, 146 F. Supp. 786, held that the claims were entitled to a priority, refusing to follow either the *Brassel* case or the instant decision.

III.

Our industrial society has been a dynamic one and it is not surprising that both the amount and form of wages paid to wage earners should have undergone constant change in the last century. In recent times a whole series of "fringe" benefits, all part of the payment for work performed, have become part of the wage contract. Included in such fringe benefits are Christmas or annual bonuses, attendance rewards, paid vacations, paid holidays, sick leave, severance pay, cost of living increments, reimbursement for jury service, profit-sharing, pensions, guaranteed annual wage, and a wide variety of insurance payments. Both employers and employees have always regarded such benefits as part of the compensation for labor performed. To the employer they represent a cost of employment just as real as an hourly rate; to the employee they represent a form of compensation just as real as the weekly paycheck.

The Bankruptcy Law in the past has proved itself sufficiently flexible to provide the protection which, as a matter of policy, Congress has determined should be afforded to the wage earner. When, at the turn of the century, incentive and piece work payments became a prominent feature of industrial society, it was held that such payments were "wages" within the meaning of the Act. *In re Gurewitz*, 121 F. 982 (C. C. A. 2, 1903). See also *In re New England Thread Co.*, 158 F. 788 (C. C. A. 1, 1907).

The inclusion of vacation pay within the term "wages" as used in the Bankruptcy Act became an important issue in the 1940s [2] when a series of decisions held, without significant exception, that vacation pay was included. *In re Wil-low Cafeterias, Inc.*, 111 F. 2d 429 (C. C. A. 2, 1940); *In re Public Ledger*, 161 F. 2d 762 (C. C. A. 3, 1947); *Divi-*

[2] Actually the first case on the subject seems to have been *In re B. H. Gladding Co.*, 248 F. 605 (D. C. R. I., 1903), but the issue does not seem to have arisen again until about 1940.

sion of Labor Law Enforcement, State of Calif. v. *Sampsell*, 172 F. 2d 400 (C. A. 9, 1949); *In re Kinney Aluminum Co.*, 78 F. Supp. 565 (S. D. Calif., C. D., 1948); *In re Red, White & Blue Litho. Inc.* (C. C. H. Bankruptcy Decisions, ¶ 58, 151; D. C. S. D. N. Y., 1954).

Severance pay was the next fringe benefit brought to the attention of the courts. There, too, it was held uniformly that such payments came within the definition of wages. *In re Public Ledger, supra; In re Elliott Wholesale Grocery Co.*, 98 F. Supp. 1017 (S. D. Calif., 1951), affirmed *sub nom McCloskey* v. *Division of Labor Law Enforcement*, 200 F. 2d 402 (C. A. 9, 1952).

Back pay awards under the National Labor Relations Act were also construed as wages which had been "constructively earned" and therefore entitled to priority. *NLRB* v. *Killoren*, 122 F. 2d 609 (C. C. A. 8, 1941), cert. den. 314 U. S. 696 (1941).

We have already noted that Referees in Bankruptcy have extended the protection of § 64a(2) to employer contributions to security funds, beginning with Referee Joyce's decision in 1949.

Of course, the Bankruptcy Act is not the only statute in which the word "wages" is used and the courts in interpreting the National Labor Relations Act have come to the same conclusion. The leading case on the subject is *Inland Steel Co.* v. *NLRB*, 170 F. 2d 247, 251 (C. A. 7, 1948), cert. den. 336 U. S. 960 (1949). There the Court said:

> "* * * we are convinced and find that the term 'wages' as used in Section 9(a) must be construed to include emoluments of value, like pension and insurance benefits, which may accrue to employees out of their employment relationship. * * * Realistically viewed, this type of wage enhancement or increase, no less than any other, becomes an integral part of the entire wage structure * * *."

See also *Cross & Co.* v. *NLRB*, 174 F. 2d 875 (C. A. 1, 1949); *NLRB* v. *Stackpole Carbon Co.*, 128 F. 2d 188 (C. C. A. 3, 1942); *Black Clawson Co.*, 103 NLRB 928 (1953); *NLRB* v. *Bemis Bros. Bag Co.*, 206 F. 2d 33 (C. A. 5, 1953).

IV.

This Court passed upon a closely related issue at its last term. In *U. S.* v. *Carter*, No. 48, October Term, 1956, 77 Sup. Ct. 793, the question was presented as to whether employer contributions similar to those in the instant case were guaranteed by a contractor's payment bond "for the protection of all persons supplying labor" on a Federal public building project. [Miller Act, 40 U. S. C. Sec. 270a(1).] It would appear from the opinion of this Court that the collective bargaining contract and the welfare fund involved in that case were identical with the agreement and the welfare fund in the instant case, except (1) the contract in the *Carter* case specifically stated that employer contributions were not to be considered as "wages", while no such stipulation appears in the instant case; (2) in *Carter*, employer contributions were calculated on the basis of hours worked; here contributions are based on wages earned.

This Court held that the Miller Act was intended to provide "a broad but not unlimited protection" for persons supplying labor for public buildings and that payment of employer contributions to a welfare plan was "a part of the compensation for the work to be done" by the employees (77 Sup. Ct. 797).

In the *Carter* case, as in the instant case, a second issue was raised, namely, whether the welfare fund was a proper claimant. The lower courts in the *Carter* case, as the Court of Appeals here, held that the welfare plan was not a proper claimant, because it was not an employee. This Court held in *Carter* that the trustees of the welfare fund

"stand in the shoes of the employees and are entitled to enforce their rights" (at p. 798). So the petitioner here stands in the shoes of the employees of the bankrupt. Cf. *Shropshire Woodliff & Co.* v. *Bush*, 204 U. S. 186.

V.

The opinions below argue that the term "wages" did not encompass the amount of payments here under consideration. For the reasons set forth above, we believe the courts to have been in error. The courts have always interpreted the Bankruptcy Act liberally with a view to effectuating its purpose, and its purpose is to protect, as fully as possible, a priority to compensation due to employees. *In re Lawsam Electric Co. Inc.*, 300 F. 736 (D. C. S. D. N. Y., 1924); *Blessing* v. *Blanchard*, 223 F. 35 (C. C. A. 9, 1915); *Guaranty Title & Trust Co.* v. *Title Guaranty & Surety Co.*, 224 U. S. 152, 160 (1912); *Manly* v. *Hood*, 37 F. 2d 212, 214 (C. C. A. 4, 1930). Cf. *United States* v. *Carter*, *supra*.

The additional contention was made by the Court of Appeals here, that the claimant is not a workman to whom wages are due and hence is not entitled to a priority. This point was not raised by the Trustee in Bankruptcy nor by any of the persons objecting to allowance of the claim, nor was it considered by the Referee or the District Court. The issue seems to have been disposed of by the *Carter* case, *supra*. Cf. *Nathanson* v. *NLRB*, 344 U. S. 25; *NLRB* v. *Killoren*, 122 F. 2d 609.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Dated: July 11, 1957.

Respectfully submitted,

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Appendix A

(Opinion of the United States Court of Appeals for the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 77—October Term, 1956

(Argued January 14, 1957 Decided March 4, 1957)

Docket No. 24113

LOCAL 140 SECURITY FUND,

Claimant-Appellant,

against

WILLIAM S. HACK, Trustee in Bankruptcy of SLEEP PRODUCTS, INC.,

Respondent-Appellee.

Before:

MEDINA and HINCKS, *Circuit Judges*, and LEIBELL, *District Judge*.

Appeal by Local 140 Security Fund from an order of the District Court for the Southern District of New York (Herlands, J.) confirming an order of a Referee in Bankruptcy which disallowed the claim of the appellant herein as a priority claim under Sec. 64(a)(2) of the Bankruptcy Act. Affirmed.

RABINOWITZ & BOUDIN, New York City, for Claimant-Appellant.

MEYER LINDENBAUM, New York City (Booth, Lipton & Lipton, New York City; Edgar A. Booth and Leonard A. Sheft, of Counsel), for Respondent-Appellee.

PETER CAMPBELL BROWN, Corporation Counsel, New York City (Stanley Buchsbaum, Bernard H. Sherris and John J. Lyden, of Counsel), for Claimant, City of New York.

PAUL W. WILLIAMS, United States Attorney for the Southern District of New York, New York City (William Stackpole, of Counsel), Amicus Curiae.

LEIBELL, *District Judge*:

In the above entitled bankruptcy proceeding Local 140 Security Fund filed a claim for $2,400.00. It further asserted that the claim was entitled to priority as a claim for "wages" pursuant to Section 64(a)(2) of the Bankruptcy Act.[1] A petition to expunge the Fund's claim was filed with the Referee by the trustee of the bankrupt. Prior to a hearing on the petition, a stipulation of facts was entered into and the amount of the claim was reduced to $993.75. The claimant's right to priority for the reduced amount, as a claim for "wages," was contested before the Referee. He sustained the trustee's contention that the

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[1] § 64. DEBTS WHICH HAVE PRIORITY.

(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (2) wages not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceedings, due to workmen, servants, clerks, or travelling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; * * *. [T. 11 U. S. C. § 104(a)(2).]

claim was not a wage claim and was not entitled to priority. He allowed the claim only as a general claim.

On a petition to review the Referee's determination, the District Court sustained the Referee's ruling and entered an order accordingly. The issue is now before this Court on an appeal by the Fund from the District Court's order. The City of New York, a tax claimant, joins with the trustee in opposing the Fund's claim to priority. So does the Government, also a tax claimant.

A form of collective bargaining agreement between Local 140 and Sleep Products, Inc. (Ex. C annexed to the Stipulation of Facts) contained the usual provisions in relation to the hiring of employees, hours of employment, rates of compensation, days to be defined as legal holidays, vacation pay, and the deduction from the wages of the employee of an appropriate amount for "dues" payable to the Union.

Paragraph Thirty-second of the agreement contained provisions for payments to be made by the employer to Local 104 Security Fund and reads as follows:

> "Thirty-second: The Employer hereby agrees, as long as this agreement remains in effect, to pay monthly on or before the tenth day of each month, a sum equal to 6% of the monthly gross payroll of the employees in the bargaining unit, to Local 140 Security Fund, for the purpose of financing a Security Plan for the benefit of the employees of the Employer within the bargaining unit. At the same time the Employer shall forward a report setting forth the figures upon which payment is based.
>
> Commencing February 15th, 1953, the Employer agrees to pay an additional one-half (½%) per cent to the Local 140 Security Fund, the sum to be applicable to the Welfare provisions of the Security Fund, making it a total of six and one-half (6½%) per cent.
>
> The employer further agrees to make the aforesaid monthly remittances to the Local 140 Security

Fund at its offices and that each monthly payment shall be based upon the gross payroll of the employees in the bargaining unit for the preceding month.

It is understood that the social benefits to be provided will meet the requirements of all applicable laws and will satisfy the Employer's obligations under the New York State Disability Law, without further obligation on the part of the Employer.[2]

It is agreed that Local 140 Security Fund will be administered in compliance with the provisions of all applicable laws."

The Referee, in expunging the claim as a priority claim, based his decision on Judge Brennan's ruling in a similar case, *Matter of Brassel*, 135 F. Supp. 827 (Northern District of New York).

In the *Brassel* case Judge Brennan held that a creditor, a union welfare trust fund, making a claim against Brassel's estate based on his failure as an employer to pay to the union's welfare fund 5% of the gross payroll of all employees covered by a collective bargaining agreement, was not entitled to priority on its claim as a wage claim.

In affirming Referee Lowenthal's order in the case at bar Judge Herlands wrote a well-considered opinion (141 F. Supp. 463) and concluded that any enlargement of the term "wages" in Section 64(a)(2) of the Bankruptcy Act, so as to include payments made by an employer to a Welfare Fund under a collective bargaining agreement, should be left to Congressional action through an amendment to the Act. To support that view he cites what the New York State Legislature did in 1952, in amending Section 22 of

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[2] The New York Disability Benefits Law which is part of the Workmen's Compensation Law §§ 200 to 242, by § 211(5) thereof recognizes an agreement such as the present one, as a compliance with the employer's obligations under that statute.

the Debtor and Creditor Law to include in the definition of "wages or salaries" the contributions of employers to insurance or welfare benefits, and to pension and annuity funds. Claims of Welfare Funds for unpaid sums due from the employer are granted a preference in the administration of the estate of an employer who makes a General Assignment for the benefit of his creditors under the New York statute.

Prior to the July 1952 amendment of Section 22 of the New York Debtor and Creditor Law, judges of the State Supreme Court had rendered conflicting opinions on the right of a Welfare Fund to a preference similar to the preference given wage claims in a proceeding under a General Assignment.[3] In the Federal Court we now have conflicting opinions in the District Courts on the right of Welfare Funds to a wage claim priority against a bankrupt employer.[4]

Judge Brennan's opinion in the *Brassel* case has been the subject of commentary notes in two Law Reviews. The Georgia Bar Journal of August 1956 (Vol. XIX, Number 1) pp. 107-108, disagreed with Judge Brennan's opinion. The article stated that the opinion seemed to minimize the idea of partial benefit to the employee (who would cease to derive any benefit upon a lapse in union membership) and to disregard the connection between the payments to the fund and the work done.

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[3] See *In re Well Bilt Box Spring Corp.* (1949), 89 N. Y. S. 2d 768.

[4] The *Brassel* case in the Northern District of New York (Judge Brennan's opinion); the *In re Otto* case in the Southern District of California, 146 F. Supp. 786 (Judge Mathes' opinion); and Judge Herlands' opinion in the present case. In addition there are conflicting opinions of Referees in Bankruptcy.

The article in the Chicago-Kent Law Review, Vol. XXXIV (1955-1956) pp. 235-239 agreed with Judge Brennan's disposition of the *Brassel* case and stated:

> "The conclusion reached in the instant case, therefore, seems to be an inescapable one even under the most liberal construction of all of the terms of the relevant portions of the statute for the claimant was not a workman, or an assignee of a workman; the sum claimed did not represent wages in the ordinary sense of the term; and the amount payable, while measured by the amount of wages earned, formed no more than a contractual obligation owed to a third person. * * * If the fringe benefits now common under modern mass employment contracts are to be protected against the impact of bankruptcy, substantial revision would have to be made both in the statutory language and in the fundamental concepts concerning priorities."

Judge Herlands' opinion in the case at bar has been discussed in a rather extensive note in 66 Yale Law Journal, No. 3, pp. 449 to 461. The author states that "from the standpoint of legislative intent, however, the *Sleep* opinion may appear to be on solid ground." * * * "The courts, however, should ascribe a broader purpose to the wage priority."

To follow that suggestion would lead to as many different judicial opinions as there are different forms of collective bargaining agreements containing provisions for payments to Welfare Funds. Some contain an assignment of a portion of the workmen's wages as a payment to the Welfare Fund. *In re Ross*, 117 F. Supp. 346. There is a sound basis for a claim of priority by the assignee, the Welfare Fund, in such a case,[5] although the determination

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[5] *Shropshire, Woodliff & Co.* v. *Bush*, 204 U. S. 186; *In re Stultz*, 226 Fed. 989.

of the amount of its claim, if the employees also have filed claims for unpaid wages, may present some difficulty. Other collective bargaining agreements, such as in the case at bar, provide only for a payment by the employer to the Welfare Fund, with no assignment or deduction from the workmen's wages. An intermediate class contains a combination of payments by the workman and by the employer to the Fund.

The claim in its origin must be one for wages due to a workman, to be entitled to priority under Sec. 64(a)(2). If it is, the right of priority carries over to the workman's assignee. If the claim was never a part of his wages and was never a sum due to him, it would not be entitled to priority; and no theory of an indirect conditional benefit to him can give it priority. "The priority is attached to the debt, and not to the person of the creditor; to the claim and not to the claimant."[5]

In *Nathanson* v. *Labor Board*, 344 U. S. 26, Mr. Justice Douglas, writing the majority opinion, denied claims of the Board for back pay awards made under Section 10(c) of the National Labor Relations Act, to fifth class priority as a claim of the United States under Section 64(a)(5) of the Bankruptcy Act. The claims were genuine claims for wages but they could not meet the priority requirement of having accrued within three months of the employer's bankruptcy under Section 64(a)(2). The opinion stated (pp. 28-29):

> "The Board argues that the interest of the United States in eradicating unfair labor practices is so great that the back pay order should be given the additional sanction of priority in payment. Whether that should be done is a legislative decision. The contest now is no longer between employees and management but between various classes of creditors.

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[5] *Shropshire, Woodliff & Co.* v. *Bush*, 204 U. S. 186; *In re Stultz*, 226 Fed. 989.

> The policy of the National Labor Relations Act is fully served by recognizing the claim for back pay as one to be paid from the estate. The question whether it should be paid in preference to other creditors is a question to be answered from the Bankruptcy Act. When Congress came to claims for unpaid wages it did not grant all of them priority. It limited the priority to $600 for each claimant and even then only allowed it as respects wages earned within three months before the date of the commencement of the proceedings. § 64(a)(2). We would depart from that policy if we granted the priority to one class of wage claimants irrespective of the amount of the claim or the time of its accrual. The theme of the Bankruptcy Act is 'equality of distribution' (*Sampsell* v. *Imperial Paper Corp.*, 313 U. S. 215, 219); and if one claimant is to be preferred over others, the purpose should be clear from the statute. We can find in the Bankruptcy Act no warrant for giving these back pay awards any different treatment than other wage claims enjoy."

What were specified in the collective bargaining agreement, Exhibit C, as payments by the employer to Local 140 Security Fund under paragraphs Thirty-second and Thirty-third, created only a debtor and creditor obligation between the employer and third parties, for something other than wages. The language of the statute granting priority to wages cannot be stretched so as to embrace this type of claim. If every type of payment made by an employer to a union welfare fund is to be given priority as a claim for "wages" under Section 64(a)(2) of the Bankruptcy Act, that should be done through the legislative action of the Congress, and not by any judicial mislabeling of such payments as "wages."

The order of the District Court is *Affirmed*.

HINCKS, Circuit Judge (concurring):

I concur in all respects with Judge Leibell's opinion. I add these few words only to make it plain that in my opinion the indicated result is required not only because the debts for which the statutory priority is claimed are not "wages" but also because they are not "due to workmen, servants, clerks, etc." To me it seems self-evident that the appellant-Fund is not a *workman*. Nor have any of the "workmen" assigned their claims to the appellant. It appears to me wholly inadmissible to say that the appellant is an "equitable assignee" of "workmen" when, as the appellant truly says in its brief, no employee "has any right, title or interest in the trust fund, except the right to insurance coverage and welfare benefits"; and "No employee has an option to receive any part of the employer's contribution in lieu of insurance benefits."